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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL.,
Appellees.

APPEAL FROM A UNITED STATES DISTRICT COURT OF
THREE JUDGES FOR THE DISTRICT OF MARYLAND

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

When examined in light of the record in this case and the State's arguments for upholding Maryland's candidate filing deadline, Appellees' principal contentions do not withstand scrutiny. Their Brief is marked by contradictions, omissions, errors and unsupported assumptions.

For example, Bradley and his supporters rely throughout their Brief on the lower court opinion, which held that Maryland's candidate filing deadline *standing by itself* was unconstitutional. Yet their arguments reveal an attack upon other specific features of State election law which are clearly constitutional. They now

claim to be aggrieved because (1) Maryland requires independent candidates to gain access to the general election ballot by gathering signatures rather than by battling opponents in a primary (Appellees' Brief at 3, 29-30); (2) because State law requires an independent to gather signatures totaling three percent (3%) of registered voters (Appellees' Brief at 21, 22, 36); and (3) because Statewide candidates understandably must generate proportionately greater popular support than local candidates to obtain general election ballot access (Appellees' Brief at 21, 22, 36). Yet this Court has rejected such grievances by independent candidates in the past. *Storer v. Brown,* 415 U.S. 724, 740 (1974); *Jenness v. Fortson,* 403 U.S. 431 (1971) at 440. In essence, Appellees' Brief is marked by indirect attacks on what can not be attacked directly. But rather than rehash all of Appellees' inconsistencies, the State will focus its Reply Brief on questions that merit special attention.

ARGUMENT

I.

APPELLEES HAVE FAILED TO DEMONSTRATE THAT SECTION 7-1(e) EXCESSIVELY BURDENS THEIR RIGHTS OR UNCONSTITUTIONALLY DISCRIMINATES AGAINST INDEPENDENT CANDIDATES.

One major fallacy in Appellees' argument is their attempt to place the principal or exclusive blame for the initial failure of the Bradley petition filing on Maryland's statutory filing deadline. Inconceivably, Appellees would have this Court believe that the invalidation of 11,190 of the 53,239 signatures proffered by the filing deadline (some 2,000 more than needed to qualify under Maryland law for access to the general election ballot) was somehow caused by the Section 7-1(e)[1] deadline

[1] As Appellants noted in their Brief, Section 7-1(e) was amended effective July 1, 1976, so that the filing deadline of that statute now appears as Section 7-1(i). Because the lower court's opinion and order and the State's notice of appeal were filed before the effective date of the change, Appellants have referred to the statutory provisions whose constitutionality is at issue as Section 7-1(e).

rather than the inefficiency of their signature-gathering campaign. Bradley's simplistic "but for" reasoning ignores the fact that but for these invalidations, but for the fact that Bradley was a political unknown, but for the lack of a stronger campaign organization, but for the mistakes of his petition-gatherers, but for the lack of an earlier start to his signature gathering effort, the candidate would have obtained a place on the November ballot without court intervention.

In addition, Bradley assumes that the burdens of an independent candidate's route to the general election ballot in Maryland are inherently greater than those of party primary candidates. Based upon this assumption, he asserts that independents must be afforded advantages not available to party candidates. This is clear from Appellee's proffered "least restrictive alternative," i.e., his proposed rewriting of the Maryland filing deadline. In effect, Bradley would push back the date an independent's candidacy becomes perfected and official until the date of the primary plus 35 days for signature verification plus an additional time for notification and possible administrative and legal challenges. What legitimate or compelling interest can the State assert when a primary victor challenges this favoring of late blooming independent candidacies as a denial of equal protection?

Finally, Appellees' assumptions and their reliance on them run counter to the stringent showing this Court has stated to be necessary to invalidate ballot access restrictions. See *Storer v. Brown, supra,* at 730.[2] Rather than assume the burdens of the Section 7-1(e) filing

[2] In Storer, this Court said that its test for determining the validity of such provisions is not "self-executing" and that only "excessively burdensome" restrictions call into play constitutional scrutiny. *Id.* at 730, 738.

deadline, this Court should focus on the "open quality" of Maryland's ballot access laws, the demonstrable evenhandedness of their operation and the insubstantiality of the alleged disadvantages suffered by Bradley as a result of the deadline. Such a focused analysis can only lead to the conclusion that Appellees have failed to show that the Section 7-1(e) filing deadline excessively burdens their rights or unconstitutionally discriminates against independent candidates.

II.

THE NUMEROUS STATE INTERESTS ASSERTED IN SUPPORT OF SECTION 7-1(e) MORE THAN JUSTIFY WHATEVER BURDENS OR DISCRIMINATION THAT MAY BE SAID TO ARISE FROM MARYLAND'S CANDIDATE FILING DEADLINE.

Even assuming that the burdens of Maryland's candidate filing deadline on independent candidates are "excessive" and that the statute's effect is in some way discriminatory, Section 7-1(e) is amply supported by important State interests. Despite Bradley's assertion to the contrary (Appellees' Brief, p. 30), all of these interests were raised below and discussed extensively in the State's Memorandum of Law. And, although Appellees attempt to create straw men by rehashing and attacking the State interests rejected by the three-judge panel in *Salera* (Appellees' Brief, pp. 27-29), Maryland's justifications for its candidate filing deadline both here and in the lower court are substantially different and more weighty than those asserted by Pennsylvania.

Appellees mischaracterize and misunderstand the "equal treatment" rationale for the State's simultaneous filing deadline for independent and party candidates. Undeniably, independent and party candidates do not follow the same route to obtain access to the general election ballot.[3] But such candidates are treated

[3] Nor does the Constitution require the State to permit both candidates to follow the same route. See *Jenness v. Fortson*, *supra*, at 440-41.

"equally" in that neither is given an unfair advantage over the other. (See Appellants' Brief, pp. 30-35; 37-38). Secondly, Bradley belittles the State's asserted interest in fostering the integrity of the electoral process by the uniform filing deadline, see *Jenness v. Fortson*, *supra*, at 442, by naively assuming that sham independent candidacies promoted by a party candidate to siphon votes would be "branded . . . and exposed to the ultimate detriment of his own campaign" (Appellees' Brief, p. 30). However, Maryland's 1975 experience with such sham candidacies demonstrates to the contrary.[4]

In challenging another of the State's legitimate interests, viz., that of fostering public discussion among *all* candidates during the primary, Bradley makes a similar misstatement. Appellees suggest in their Brief that the reason Bradley did not engage in public debate during the primary campaign was because he had been denied certification by the State Board (Appellees' Brief, p. 33). However, candidate Bradley was silent not only after that denial, but also during the entire 37 day period between the March 8 filing date and his notification on April 15 that he had not qualified for the general election ballot.

Finally, Appellees denigrate the State's interest in preserving the right of Maryland voters to be heard at an early point in a Presidential election year as to their

[4] Prior to the September 1975 Baltimore City primary, City Councilmanic candidate Norman Reeves brought suit to keep a political unknown named James Reeves off the primary ballot. A Circuit Court judge, finding that the entry of the "name's the same" candidate into the race was part of a scheme to siphon off votes from Norman Reeves, granted the requested injunctive relief. On appeal and in the face of arguments that such relief could not be granted in the absence of a statute or actionable fraud, the Maryland Court of Appeals reversed. Reeves v. Reeves, 275 Md. 599 (1975). Subsequently in the primary Norman Reeves lost the election to two successful incumbents by 530 and 808 votes, respectively. James Reeves polled 1,523 votes.

choice for Presidential nominees (Appellees' Brief, p. 34). What Bradley fails to realize is the obvious fact that under Maryland's election scheme, were it not for the necessity of an early Presidential primary, the filing date for all candidates would occur in July (120 days before the general election).[5] The Presidential Preference Primary is the raison d'etre of the March filing date. However, if Appellees prevail, the State will face an array of cruel choices: (1) move the date of its Presidential Preference Primary back to July, by which time the Presidential nominees may already have been determined; (2) hold two separate primary elections at different times; or (3) abandon its present evenhanded system for one of disparate filing dates for independent and party candidates. Nothing in the Constitution requires the State to make such a choice.[6]

III.

THE PRECEDENTIAL VALUE ACCORDED *SALERA v. TUCKER* BY APPELLEES AND THE LOWER COURT IS NOT SUPPORTED BY *HICKS v. MIRANDA* AND IS INCONSISTENT WITH *FUSARI v. STEINBERG.*

The unstated premise of Bradley's discussion of *Hicks v. Miranda,* 422 U.S. 332 (1975) is that a summary

[5] A filing deadline of 150 days before the general election was upheld in Jenness v. Fortson, *supra.*

[6] For these same reasons, Appellees' proffered "least restrictive alternative" to the Section 7-1(e) filing deadline should be rejected. Bradley's rewriting of the Maryland statute would require the State to abandon clearly legitimate and constitutional features of its election law, viz. a one-time three percent of the vote signature gathering requirement, a simultaneous filing date, a 35-day period to validate signatures (see Appellees' Brief, p. 35). In addition, what was proven to be an evenhanded and workable system must be scrapped for a complex scheme that places greater burdens on all candidates and may unfairly discriminate against party candidates (Appellants' Jurisdictional Statement, at 26). As this Court noted in Rosario v. Rockefeller, 410 U.S. 752, 762 n. 10 (1973), the concept that a State should use the least restrictive means to achieve its desirable goals "does not require that the State choose ineffectual means."

affirmance must be read by lower courts as an engine of destruction of prior written and summary decisions and thus of the established doctrine of the Supreme Court. However, this Court has indicated that while it may be a decision on the merits, *Tully v. Griffin, Inc.,* ___ U.S. ___, 50 L. Ed. 2d 227 (1976), a summary affirmance is not as binding as a written opinion of this Court. *Id.* at 233. *Edelman v. Jordan,* 415 U.S. 651, 671 (1974). Nor can a summary affirmance be read as a renunciation of doctrine previously announced by this Court. *Fusari v. Steinberg,* 419 U.S. 379, 391-92 (1975) (concurring opinion of Chief Justice Burger).[7]

Moreover, this Court has never treated all summary affirmances with equal weight and dignity. Some are never cited again. Others are quickly cast aside. See, e.g., *National Independent Coal Operators Ass'n v. Brennan,* 419 U.S. 955 (1974). However, some summary affirmances when cited or discussed in subsequent written opinions may become important and influential. See, e.g., *Starns v. Malkerson,* 401 U.S. 785 (1971), discussed in *Vlandis v. Kline,* 412 U.S. 441 (1973) and *Weinberger v. Salfi,* 422 U.S. 479 (1975). In this last category of summary affirmances, which this Court has accorded the most influence, is *Auerbach v. Mandel,* 409 U.S. 808 (1972). In this Court's last written opinion on independent candidacies, *Storer v. Brown, supra, Auerbach* was cited as illustrative of a nomination by petition scheme whose constitutionality was sustained by this Court. This should have served as a warning light to the lower court in *Bradley* that it was not free to speculate that the only issue decided by this Court in *Auerbach* was one of statutory construction (AJA 10a-11a) and in effect redecide the 1972 decision of this Court.

[7] This question is also discussed in Sidle v. Majors, ___ U.S. ___, 50 L. Ed. 2d 316 (1976) (dissenting opinions of Justices Brennan and Marshall); and Colorado Springs Amusements Ltd. v. Rizzo, 96 S. Ct. 3228 (1976) (dissenting opinion of Justice Brennan).

But aside from the issue of whether *Auerbach* and the other numerous summary affirmances of this Court sustaining filing deadlines such as Section 7-1(e) are still good law after *Salera*, one thing is clear — a summary affirmance in *Salera* could not have overturned, *Jenness v. Fortson, supra*, and *Williams v. Rhodes*, 393 U.S. 23 (1968), as the lower court has in effect held.

As noted earlier, the *Bradley* court based its decision primarily on the alleged hardships of a 70-day pre-primary filing deadline. Yet in *Jenness*, a written opinion, a 69-day preliminary filing deadline was sustained. In *Williams*, a written opinion, a filing deadline of nine months before the general election was treated as only one of a number of features of a state law regulating ballot access to be gauged in combination in determining the law's constitutionality.[8] Yet the *Bradley* court examined the Section 7-1(e) filing deadline in isolation in its belief that such was required by *Salera*. Nothing in *Hicks v. Miranda* would authorize lower courts to negate this Court's written decisions in such a fashion. Moreover, such a result that turns this Court's silence into dogma could have been easily avoided if the lower court had applied the principles articulated in the ballot access opinions of this Court rather than its perception of the lower court opinion in *Salera*. The *Bradley* court, consistently with *Hicks*, could have relied on *Auerbach*, a summary affirmance involving the statute at issue in this case that is entirely in accord with written decisions of the Supreme Court. Instead, it chose to rely on a decision scrutinizing the ballot access statute of another state and to heighten the tension between written Supreme Court decisions and *Salera*. It was precisely this kind of lower

[8] Sweetenham v. Gilligan, 409 U.S. 942 (1972) emphasizes this point. Therein, a February filing deadline which was not coupled with other onerous features like those present in Williams was upheld as constitutional.

court action which was condemned by this Court in *Fusari v. Steinberg, supra*. In that case, a three-judge District Court in Connecticut relied on a 1972 summary affirmance of a three-judge court decision involving the question of whether New York's unemployment compensation scheme was in conflict with a federal law requiring benefits to be paid out in a timely fashion ("when due"), *Torres v. New York State Dept. of Labor*, 405 U.S. 949 (1972). The three-judge panel read the *Torres* summary affirmance broadly so as to foreclose its inquiry into the federal statutory question presented — a result this Court said would fly in the face of a written Supreme Court decision, viz. *California Human Resources Dept. v. Java*, 402 U.S. 121 (1971):

> "The District Court interpreted our summary affirmance in *Torres* to indicate that benefits are not 'due' under § 303 until administratively deemed payable. 364 F. Supp. at 930. While this is a plausible reading of the evolution and affirmance of *Torres*, it is not one that we can endorse. *Such a definition of the 'when due' requirement of federal law would leave little vitality to Java and would nullify the congressional intention of requiring prompt administrative provision of unemployment benefits.* See 402 U.S. at 130-133, 91 S. Ct. at 1353-1354. *By reading our summary affirmance in Torres at its broadest, the District Court heightened the tension between that judgment and our more considered disposition of Java. A narrower interpretation of Torres would have been appropriate.*
>
> *"Any statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility inevitably will generate fact-specific applications. In this instance many of the factual distinctions that the District Court relied on to distinguish Torres on the constitutional issue apply equally to the 'when due' question.* For example, the delay in resolving administrative appeals is considerably greater in Connecticut than in the New York system, where administrative appeals

were resolved in an average of 45 days. See Torres v. New York State Department of Labor, 321 F. Supp. 432, 439 (SDNY 1971). And as the District Court observed, the *Torres* court apparently did not consider the probable accuracy of the challenged procedure in determining whether it adequately assured delivery of benefits 'when due.' See *Steinberg*, 364 F. Supp. at 936. We do not undertake to identify the combination of factors that justify the *Torres* decision. Having once decided the case summarily, we decline to do so again. *We only indicate that the District Court should not have felt precluded from undertaking a more precise analysis of the statutory issue than it felt empowered to do in this case."* 419 U.S. at 589. (Emphasis added).

CONCLUSION

In summary, the State contends that *Salera* should have been given a narrower reading by the District Court, that the opinion of the three-judge court in Pennsylvania should not have been equated to the words of this Court, and that the lower court erred in failing to rely on the numerous written and summary decisions of this Court which support the constitutionality of Maryland's candidate filing deadline.

Respectfully submitted,

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